

Memorandum 2017-8

**Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct (Further Work on Draft Tentative Recommendation)**

The Commission<sup>1</sup> is in the process of preparing a tentative recommendation for this study, which will have three components:

- (1) A “preliminary part” — i.e., a narrative discussion of the Commission’s research and tentative conclusions.
- (2) Proposed legislation.
- (3) A Commission Comment to accompany each code section in the draft legislation.

In December, the staff presented a first draft of the proposed legislation and accompanying Commission Comments. The Commission considered various drafting issues and directed the staff to make a few changes.

A new draft of the proposed legislation and accompanying Commission Comments (“Discussion Draft #2”) is attached for the Commission to review. The new draft implements the decisions that the Commission made in December.

A few issues relating to the attached draft are discussed below. One of those issues pertains to the following new communication:

*Exhibit p.*

- Loretta Van Der Pol & J. Felix De La Torre, Public Employment Relations Board (12/1/16).....1

Before turning to those drafting issues, we raise a question relating to the preliminary part.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

## PREPARATION OF THE PRELIMINARY PART

Since the December meeting, the staff has been working on the preliminary part for the tentative recommendation. The task is time-consuming because the background work for this study was particularly extensive and the Legislature specifically asked the Commission to cover various matters. We are making good progress and expect to have a complete draft ready for the Commission to review and possibly approve in April.

To facilitate readability, we are trying to keep the draft concise yet thorough. Our current plan (easily reversed) is to split it into two separate documents:

- (1) A tentative report, which will summarize the Commission's research for this study, including its work on the matters requested by the Legislature.
- (2) A tentative recommendation, which will present and explain the Commission's preliminary conclusions.

Dividing the narrative discussion in this manner would probably be helpful to individuals and organizations that wish to review the Commission's proposal and provide input, but do not have the time or inclination to read all of the background material. They could focus on the tentative recommendation and refer to the tentative report only if they desire background information on a particular point.

Dividing the narrative discussion in the above manner would also be advantageous if the Commission decides to seek input on more than one approach (a possibility discussed in Memorandum 2016-59 and its First Supplement, which are on the agenda for the upcoming meeting). In that event, the staff could prepare more than one tentative recommendation, without having to repeat all of the background material.

**Is the above-described drafting approach acceptable to the Commission?**

## ISSUES RELATING TO DISCUSSION DRAFT #2

The remainder of this memorandum presents issues relating to Discussion Draft #2.

### **Types of Disputes in Which the New Exception Would Apply**

At the December meeting, the Commission discussed several issues relating to the types of disputes in which its proposed new exception (proposed Evidence

Code Section 1120.5) would apply. The Commission decided that the proposed statutory language in Discussion Draft #1 was satisfactory to address those issues.<sup>2</sup>

It further decided, however, that the corresponding Comment should state:

Section 1120.5 applies “when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation — that is, an obligation the attorney has by virtue of being an attorney — in the course of providing professional services.” *Lee v. Hanley*, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015) (emphasis in original); *see also id.* at 1239. “Misconduct does not ‘aris[e] in’ the performance of professional services ... merely because it occurs during the period of legal representation or because the representation brought the parties together and thus provided the attorney the opportunity to engage in the misconduct.” *Id.* at 1238.<sup>3</sup>

The Commission did not specify where in the Comment to place that language.

To implement the Commission’s decision, the staff revised the second paragraph of the Comment as shown in underscore below:

Under paragraph (1) of subdivision (a), this exception pertains to an attorney’s conduct in a professional capacity. More precisely, the exception applies “when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation — that is, an obligation the attorney has by virtue of being an attorney — in the course of providing professional services.” *Lee v. Hanley*, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015) (emphasis in original); *see also id.* at 1239. “Misconduct does not ‘aris[e] in’ the performance of professional services ... merely because it occurs during the period of legal representation or because the representation brought the parties together and thus provided the attorney the opportunity to engage in the misconduct.” *Id.* at 1238. The exception applies only with respect to alleged misconduct of an attorney acting as an advocate, not with respect to alleged misconduct of an attorney-mediator.

### **Is this revision satisfactory?**

#### **Notice Provision**

At the December meeting, the Commission also discussed whether to add a notice provision to its proposed new exception, along the following lines:

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2. See Minutes (Dec. 2016), pp. 5-6.

3. *Id.* at 6.

Upon filing a complaint or a cross-complaint that includes a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation, the plaintiff or cross-complainant shall serve the complaint or cross-complaint by mail, in compliance with Sections 1013 and 1013a of the Code of Civil Procedure, on all of the mediation participants whose addresses are reasonably ascertainable.<sup>4</sup>

The Commission decided to add such a provision, but it asked the staff to revise the language to address the possibility that a disputant might not know or be able to determine the identity of all of the mediation participants.<sup>5</sup>

To implement that decision, the staff added a new subdivision to proposed Section 1120.5. The new subdivision provides as follows, with deviations from the previously discussed language shown in ~~strikeout~~ and underscore:

(d) Upon filing a complaint or a cross-complaint that includes a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation, the plaintiff or cross-complainant shall serve the complaint or cross-complaint by mail, in compliance with Sections 1013 and 1013a of the Code of Civil Procedure, on all of the mediation participants whose identities and addresses are reasonably ascertainable. This requirement is in addition to, not in lieu of, other requirements relating to service of the complaint or cross-complaint.

The staff also added the following new paragraph to the accompanying Comment:

Under subdivision (d), when a party files a legal malpractice case in which mediation communications or writings might be disclosed pursuant to this section, that party must promptly provide notice to the mediation participants regarding commencement of the case. Each mediation participant is entitled to such notice, so long as the participant's identity and address is reasonably ascertainable. This affords an opportunity for a mediation participant who would not otherwise be involved in the malpractice case to take steps to prevent improper disclosure of mediation communications or writings of particular consequence to that participant. For instance, a mediation participant could move to intervene and could then seek a protective order or oppose an overbroad discovery request.

#### **Are these revisions acceptable to the Commission?**

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4. See Memorandum 2016-58, p. 36.

5. Minutes (Dec. 2016), p. 7.

## **New Communication From the Public Employment Relations Board**

In December, the Commission considered comments urging it to make its proposed new exception inapplicable to:

- (1) Community-based mediation programs funded under the Dispute Resolution Programs Act.
- (2) Family law mediations.<sup>6</sup>

The Commission decided not to make such changes to Discussion Draft #1.<sup>7</sup>

In a memorandum for the December meeting, the staff noted that the Public Employment Relations Board (“PERB”) had also asked to be exempted from the Commission’s proposed new exception, but “PERB’s concerns primarily focused on mediator testimony, and presumably were alleviated, at least to some extent, by the Commission’s decision to leave the provision on mediator testimony (Evidence Code Section 703.5) unchanged.”<sup>8</sup> The staff was not sure whether PERB was still requesting an exemption, so we encouraged PERB to clarify its position on that point.<sup>9</sup>

In response, PERB submitted a new letter, “requesting to be exempted from Section 1120.5.”<sup>10</sup> In its new letter, PERB primarily relies on the reasons given in its earlier letter.<sup>11</sup> PERB says that “nothing ... could be added except that other State of California departments and agencies with formal mediation processes for disputes should be provided the same exemption.”<sup>12</sup> PERB points out that the mediation work of such entities “is also being performed by public employees who are charged with protecting the public’s interest.”<sup>13</sup>

For the Commission’s convenience, PERB enclosed a copy of its earlier letter, which PERB representatives testified about at a Commission meeting in October 2015.<sup>14</sup> That letter is reproduced at Exhibit pages 3-5. Commissioners and other interested persons may wish to review it to refresh their recollections regarding its contents.

PERB’s new letter also explains:

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6. See Memorandum 2016-58, pp. 25-33.

7. Minutes (Dec. 2016), p. 5.

8. Memorandum 2016-58, p. 26.

9. See *id.*

10. Exhibit p. 1.

11. See *id.*

12. *Id.*

13. *Id.*

14. See Third Supplement to Memorandum 2015-46, Exhibit pp. 7-9.

PERB's very serious concern is the proposed language specifying that alleged misconduct pertains only to the conduct of an attorney who is performing professionally as an advocate, not as an attorney-mediator. This is not sufficient to protect the confidentiality of its mediation work, as the language then goes on to describe how, **in determining whether or not a plaintiff has cause to pursue a claim of misconduct**, mediation documents could be unsealed and testimony in some form could be required. As one example, the proposed legislation would permit a party to compel the attendance of a PERB mediator at a deposition to provide evidence as a witness, requiring disclosure of otherwise confidential information. This is unacceptable and unintentionally subverts the confidentiality protections afforded in sections 703.5, 958, and 1119 of the California Evidence Code.<sup>15</sup>

These comments confused the staff, particularly the sentence about compelling a PERB mediator to attend a deposition and disclose confidential information. We were not sure which language PERB was referring to, whether PERB had reviewed Discussion Draft #1, and whether PERB realized that the Commission had preliminarily decided *not* to revise Evidence Code Section 703.5, which makes a mediator generally incompetent to testify.

To obtain some clarification, the staff called Loretta Van Der Pol (Chief of the State Mediation and Conciliation Service in PERB). From that conversation, the staff understands the following:

- PERB's big concern is the prospect of forcing a PERB mediator to testify or provide documentary evidence relating to a PERB mediation.
- In preparing PERB's most recent letter, PERB representatives were referring to Discussion Draft #1 and the remainder of the memorandum presenting that draft (Memorandum 2016-58). They do not think that material makes sufficiently clear that the Commission's proposal would have no impact on a mediator's competency to provide evidence relating to a mediation.
- Making that point more obvious would go a long way towards addressing PERB's big concern.

Given those considerations, **it might be helpful to revise proposed Section 1120.5 and the corresponding Comment along the following lines:**

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a

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15. Exhibit p. 1 (boldface in original).

mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if ....

(e) Nothing in this section is intended to affect the extent to which a mediator is, or is not, immune from liability under existing law.

(f) Nothing in this section is intended to affect the extent to which a mediator is, or is not, competent to provide evidence under Section 703.5.

**Comment.** Section 1120.5 is added to ....

Subdivision (e) makes clear that the enactment of this section has no impact on the state of the law relating to mediator immunity.

Subdivision (f) makes clear that the enactment of this section has no impact on the state of the law relating to a mediator's competency to provide evidence about a mediation. See Section 703.5 (in general, no mediator "shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding").

See Sections 250 ("writing"), 1115(a), (c) ("mediation" and "mediation consultation"). ~~For restrictions on mediator testimony, see Section 703.5.~~ For availability of sanctions, see, e.g., Section 1127; Code Civ. Proc. §§ 128.5, 128.7.

The staff has not yet sought PERB's input on this language, but we plan to do so before the upcoming meeting. We will let the Commission know how PERB responds.

**Would the Commission like to make the revisions shown above?**

### **Additional Drafting Issue**

Saul Bercovitch (Legislative Counsel for the State Bar) recently alerted the staff that the State Bar Committee on Mandatory Fee Arbitration has a concern regarding how the Commission's proposal would handle a fee dispute. The committee is preparing written comments on this point, which must go through the State Bar's approval process before they are released.

Mr. Bercovitch anticipates that the committee will submit its comments to the Commission in time for consideration at the Commission's April meeting. We will keep the Commission posted on this matter.

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

## DISCUSSION DRAFT #2

1 **☞ Staff Note.** Late last year, the staff presented a Discussion Draft for the Commission's  
2 consideration (Discussion Draft #1). See Memorandum 2016-58, pp. 5-7. At its December  
3 meeting, the Commission directed the staff to make a few changes. See Minutes (Dec. 2016), pp.  
4 5-7.

5 A new draft implementing the Commission's instructions is presented below (Discussion Draft  
6 #2). The revisions are shown in ~~strikeout~~ and underscore.

### 7 **Evid. Code § 1120.5 (added). Alleged misconduct of lawyer when representing client in** 8 **mediation context**

9 SEC. \_\_\_\_\_. Section 1120.5 is added to the Evidence Code, to read:

10 1120.5. (a) A communication or a writing that is made or prepared for the  
11 purpose of, or in the course of, or pursuant to, a mediation or a mediation  
12 consultation, is not made inadmissible, or protected from disclosure, by provisions  
13 of this chapter if both of the following requirements are satisfied:

14 (1) The evidence is relevant to prove or disprove an allegation that a lawyer  
15 breached a professional requirement when representing a client in the context of a  
16 mediation or a mediation consultation.

17 (2) The evidence is sought or proffered in connection with, and is used solely in  
18 resolving, one of the following:

19 (A) A complaint against the lawyer under the State Bar Act, Chapter 4  
20 (commencing with Section 6000) of the Business and Professions Code, or a rule  
21 or regulation promulgated pursuant to the State Bar Act.

22 (B) A cause of action for damages against the lawyer based upon alleged  
23 malpractice.

24 (b) If a mediation communication or writing satisfies the requirements of  
25 subdivision (a), only the portion of it necessary for the application of subdivision  
26 (a) may be admitted or disclosed. Admission or disclosure of evidence under  
27 subdivision (a) does not render the evidence, or any other mediation  
28 communication or writing, admissible or discoverable for any other purpose.

29 (c) In applying this section, a court may, but is not required to, use a sealing  
30 order, a protective order, a redaction requirement, an in camera hearing, or a  
31 similar judicial technique to prevent public disclosure of mediation evidence,  
32 consistent with the requirements of the First Amendment to the United States  
33 Constitution, Sections 2 and 3 of Article I of the California Constitution, Section  
34 124 of the Code of Civil Procedure, and other provisions of law.

35 (d) Upon filing a complaint or a cross-complaint that includes a cause of action  
36 for damages against a lawyer based on alleged malpractice in the context of a  
37 mediation or a mediation consultation, the plaintiff or cross-complainant shall  
38 serve the complaint or cross-complaint by mail, in compliance with Sections 1013  
39 and 1013a of the Code of Civil Procedure, on all of the mediation participants  
40 whose identities and addresses are reasonably ascertainable. This requirement is in

1 addition to, not in lieu of, other requirements relating to service of the complaint  
2 or cross-complaint.

3 ~~(d)~~ (e) Nothing in this section is intended to affect the extent to which a  
4 mediator is, or is not, immune from liability under existing law.

5 **Comment.** Section 1120.5 is added to promote attorney accountability in the mediation  
6 context, while also enabling an attorney to defend against a baseless allegation of mediation  
7 misconduct. It creates an exception to the general rule that makes mediation communications and  
8 writings confidential and protects them from admissibility and disclosure in a noncriminal  
9 proceeding (Section 1119). The exception is narrow and subject to specified limitations to avoid  
10 unnecessary impingement on the policy interests served by mediation confidentiality.

11 Under paragraph (1) of subdivision (a), this exception pertains to an attorney’s conduct in a  
12 professional capacity. More precisely, the exception applies “when the merits of the claim will  
13 necessarily depend on proof that an attorney violated a professional obligation — that is, an  
14 obligation the attorney has by virtue of being an attorney — in the course of providing  
15 professional services.” *Lee v. Hanley*, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536  
16 (2015) (emphasis in original); *see also id.* at 1239. “Misconduct does not ‘aris[e] in’ the  
17 performance of professional services ... merely because it occurs during the period of legal  
18 representation or because the representation brought the parties together and thus provided the  
19 attorney the opportunity to engage in the misconduct.” *Id.* at 1238. The exception applies only  
20 with respect to alleged misconduct of an attorney acting as an advocate, not with respect to  
21 alleged misconduct of an attorney-mediator.

22 Paragraph (1) also makes clear that the alleged misconduct must occur in the context of a  
23 mediation or a mediation consultation. This would include misconduct that allegedly occurred at  
24 any stage of the mediation process (encompassing the full span of mediation activities, such as a  
25 mediation consultation, a face-to-face mediation session with the mediator and all parties present,  
26 a private caucus with or without the mediator, a mediation brief, a mediation-related phone call,  
27 or other mediation-related activity). The determinative factor is whether the misconduct allegedly  
28 occurred in a mediation context, not the time and date of the alleged misconduct.

29 Paragraph (1) further clarifies that the exception applies evenhandedly. It permits use of  
30 mediation evidence in specified circumstances to prove *or* disprove allegations against an  
31 attorney.

32 Paragraph (2) of subdivision (a) specifies the types of claims in which the exception applies:  
33 (1) a State Bar disciplinary action, which focuses on protecting the public from attorney  
34 malfeasance, and (2) a legal malpractice claim, which further promotes attorney accountability  
35 and provides a means of compensating a client for damages from breach of an attorney’s  
36 professional duties in the mediation context. The exception does not apply for purposes of any  
37 other kind of claim. Of particular note, the exception does not apply in resolving a claim relating  
38 to enforcement of a mediated settlement agreement (e.g., a claim for rescission of a mediated  
39 settlement agreement or a claim for enforcement of a mediated settlement agreement). That  
40 restriction promotes finality in settling disputes and protects the policy interests underlying  
41 mediation confidentiality.

42 Subdivision (b) is modeled on Section 6(d) of the Uniform Mediation Act.

43 Subdivision (c) gives a court discretion to use existing procedural mechanisms to prevent  
44 widespread dissemination of mediation evidence that is admitted or disclosed pursuant to this  
45 section. For example, a party could seek a sealing order pursuant to the existing rules governing  
46 sealing of court records (Cal. R. Ct. 8.45-8.47, 2.550-2.552). Any restriction on public access  
47 must comply with constitutional constraints and other applicable law. *See, e.g., NBC Subsidiary*  
48 *(KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 980 P.2d 330, 86 Cal. Rptr. 2d 778 (1999).

49 Under subdivision (d), when a party files a legal malpractice case in which mediation  
50 communications or writings might be disclosed pursuant to this section, that party must promptly  
51 provide notice to the mediation participants regarding commencement of the case. Each  
52 mediation participant is entitled to such notice, so long as the participant’s identity and address is

1 reasonably ascertainable. This affords an opportunity for a mediation participant who would not  
2 otherwise be involved in the malpractice case to take steps to prevent improper disclosure of  
3 mediation communications or writings of particular consequence to that participant. For instance,  
4 a mediation participant could move to intervene and could then seek a protective order or oppose  
5 an overbroad discovery request.

6 Subdivision ~~(d)~~ (e) makes clear that the enactment of this section has no impact on the state of  
7 the law relating to mediator immunity.

8 See Sections 250 (“writing”), 1115(a), (c) (“mediation” and “mediation consultation”). For  
9 restrictions on mediator testimony, see Section 703.5. For availability of sanctions, see, e.g.,  
10 Section 1127; Code Civ. Proc. §§ 128.5, 128.7.

11 **Uncodified (added). Operative date**

12 SEC. \_\_\_\_ (a) This act shall become operative on January 1, 2019.

13 (b) This act only applies with respect to a mediation or a mediation consultation  
14 that commenced on or after January 1, 2019.

15 **Comment.** To avoid disrupting confidentiality expectations of mediation participants, this act  
16 only applies to evidence that relates to a mediation or a mediation consultation commencing on or  
17 after the operative date of the act.

PUBLIC EMPLOYMENT RELATIONS BOARD  
State Mediation and Conciliation Service  
1031 18<sup>th</sup> Street  
Sacramento, CA 95811-4124  
Telephone (916) 322-7638 Fax (916) 327-7955



December 1, 2016

RECEIVED

Barbara S. Gaal, Esq.  
Chief Deputy Counsel  
California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303

**Re: Law Revision Commission Study of Relationship Between Mediation  
Confidentiality and Attorney Malpractice and Other Misconduct (Study K-402),  
PERB Response to Memorandum 2016-58**

Dear Ms. Gaal and Members of the Commission:

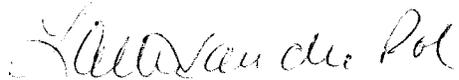
The Public Employment Relations Board (PERB) appreciates the opportunity to provide input to the referenced staff memorandum, specifically the paragraph on page 26 regarding PERB and the proposed Section 1120.5.

PERB is requesting to be exempted from Section 1120.5. We apologize if we were not clear on this point during the October 2015 meeting of the Commission.

In PERB's letter to the Commission dated October 1, 2015 (attached), supportive references and compelling practical considerations fundamental to its position that an exemption is necessary for all PERB employees who perform mediation work, were provided. There is nothing that could be added except that other State of California departments and agencies with formal mediation processes for disputes should be provided the same exemption. Their work is also being performed by public employees who are charged with protecting the public's interest.

PERB's very serious concern is the proposed language specifying that alleged misconduct pertains only to the conduct of an attorney who is performing professionally as an advocate, not as an attorney-mediator. This is not sufficient to protect the confidentiality of its mediation work, as the language then goes on to describe how, **in determining whether or not a plaintiff has cause to pursue a claim of misconduct**, mediation documents could be unsealed and testimony in some form could be required. As one example, the proposed legislation would permit a party to compel the attendance of a PERB mediator at a deposition to provide evidence as a witness, requiring disclosure of otherwise confidential information. This is unacceptable and unintentionally subverts the confidentiality protections afforded in sections 703.5, 958, and 1119 of the California Evidence Code. The most unambiguous clarification would include language that specifically exempts State of California employees performing formal mediation work as mediators or attorneys from the compelled disclosure of information disclosed during mediation, or at the very least provide this protection to PERB, for the reasons cited in its October 1, 2015 letter to the Commission.

Sincerely,



LORETTA VAN DER POL  
Chief, State Mediation and Conciliation Service  
Public Employment Relations Board



J. FELIX DE LA TORRE  
General Counsel  
Public Employment Relations Board

Attachment: Letter to the Law Revision Commission Dated October 1, 2015

Cc: File

**PUBLIC EMPLOYMENT RELATIONS BOARD**

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RECEIVED

October 1, 2015

Barbara S. Gaal, Esq.  
Chief Deputy Counsel  
California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303

Re: Relationship Between Mediation Confidentiality and Attorney Malpractice and  
Other Misconduct – Study K-402.

Dear Ms. Gaal and Members of the Commission:

The Public Employment Relations Board (PERB) submits the below comments in response to Study K-402, and the Commission's legislative recommendations that may follow. In particular, PERB urges the Commission to preserve the confidentiality afforded to PERB's mediators, as a weakening of mediator confidentiality will adversely affect their ability to resolve labor disputes.

As background, PERB is a quasi-judicial agency created by the Legislature to oversee public sector collective bargaining in California. PERB administers eight collective bargaining statutes, ensures their consistent implementation and application, and adjudicates disputes between the parties. Within PERB is the State Mediation and Conciliation Service (SMCS), which provides mediation services to primarily public and some private constituents. It is noteworthy that our mediators are public employees. Among other things, SMCS conducts mediations to: (1) end strikes and other severe job actions; (2) resolve collective bargaining agreement disputes; (3) resolve grievances arising from alleged violations of collective bargaining agreements; and (4) facilitate agreement regarding the conduct of representation elections. Similarly, PERB's Regional Attorneys conduct mediations, known as Informal Conferences, to resolve unfair practice charges. Thus, PERB mediators play an important role in maintaining harmonious labor-management relations in both the public and private sectors of the state.

For a mediator and the participants to understand the central issues, the motivations, and the risks of not resolving their dispute, the parties must be assured that the mediator will not divulge their confidential disclosures. Trust and candid discussions are essential to opening constructive and creative dialogue and to enabling parties to discover ways to resolve their disputes independent of a more formal process such as arbitration or the judicial system. While confidentiality serves the important role of fostering candid dialogue between the parties and the mediator, it is also a critical element for maintaining a mediator's impartiality. Thus, impartiality and confidentiality walk hand-in-hand. Were SMCS to lose the promise of

absolute confidentiality, it risks losing its neutrality in the eyes of our constituents. The result would be failed mediations and costly and disruptive labor disputes.

PERB recognizes that mediator confidentiality may deprive a future litigant of needed evidence, but as explained in *NLRB v. Joseph Macaluso, Inc.* (9th Cir. 1980) 618 F.2d 51 (*Macaluso*), the public interest protected by the confidentiality rules—as applied to mediators—is substantial and outweighs those rare instances where a litigant may need evidence from a mediator. In *Macaluso*, the court was asked to decide whether the National Labor Relations Board (NLRB) erred in disallowing, through the revocation of a subpoena, the testimony of a Federal Mediation and Conciliation Service (FMCS) mediator as to a crucial fact occurring in his presence. The court first acknowledged that the NLRB's revocation of the mediator's subpoena conflicted with “the fundamental principle of Anglo-American law that the public is entitled to every person's evidence.” (*Id.* at p. 54, citing to *Branzburg v. Hayes* (1972) 408 U.S. 665, 688.) The court further explained that:

The public interest protected by revocation must be substantial if it is to cause us to “concede that the evidence in question has all the probative value that can be required, and yet exclude it because its admission would injure some other cause more than it would help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth.” (*Id.*, citing to 1 Wigmore, Evidence § 11, at 296 (1940).)

The court—in holding that the need for absolute confidentiality in mediation outweighed a litigant's need for evidence—relied in large part on the important role the NLRB played in maintaining labor harmony. In particular, the court stated that “federal mediation has become a substantial contributor to industrial peace in the United States.” (*Id.* at p. 55.) The court further determined that “[a]ny activity that would significantly decrease the effectiveness of this mediation service could threaten the industrial stability of the nation.” (*Id.*)

PERB is the California public sector NLRB equivalent and shares the same important mission as to our state's public entities. Likewise, SMCS mediators serve the same vital role and function as their federal counterparts. Therefore, the conclusions reached by the court in *Macaluso*, that the loss of mediation confidentiality would inevitably impair or destroy the usefulness of FMCS in future proceedings and threaten industrial stability, are equally applicable to the mediations conducted by PERB.

Professor Ellen E. Deason described the problem of removing mediator confidentiality as follows:

A mediator who testifies will inevitably be seen as acting contrary to the interests of one of the parties, which necessarily destroys her neutrality. It is true that this departure from neutrality is not personal or intentional when a mediator is compelled to testify under subpoena. Nonetheless, if a mediator

October 1, 2015

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can be converted into the opposing party's weapon in court, then her neutrality is only temporary and illusory.

(Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?* (2001) 85 Marquette L.Rev. 79.)

In the context of PERB's mediations, the damage to a mediator's neutrality is exacerbated because our mediators routinely work with many of the same labor attorneys and/or representatives for labor and management. It is common for these advocates to participate in multiple mediations each year on behalf of their clients. Accordingly, the perceived loss of neutrality in one labor dispute will have a ripple effect that may harm mediation efforts statewide in future cases.

Presently, PERB mediators enjoy absolute confidentiality through California Evidence Code, sections 703.5, 958, and 1119. These statutes are crucial to PERB's ability to resolve labor disputes. Accordingly, PERB urges the Commission to consider the unique and important role that our mediators play in resolving the state's labor disputes, and the damage that may ensue if mediator confidentiality is eliminated or diminished.

Sincerely,



LORETTA VAN DER POL  
Chief, State Mediation and Conciliation Service  
Public Employment Relations Board



J. FELIX DE LA TORRE  
General Counsel  
Public Employment Relations Board